STATE OF STATE OF MICHIGAN

IN THE SUPREME COURT

GEORGE H. GOLDSTONE,

Plaintiff-Appellant,

vs.

BLOOMFIELD TOWNSHIP PUBLIC LIBRARY,

Defendant-Appellee.
_____/

Supreme Court No. 130150

Court of Appeals No. 262831

LC No. 04-060611-CZ
Oakland County Circuit Court

Robert E. Toohey P21500
Attorney for Plaintiff/Appellant
1790 Hammond Court
Bloomfield Hills, MI 48304
248 540 3330

Michael D. Schloff P25393
Co-Counsel for Defendant/Appellee
6905 Telegraph Road, Ste. 215
Bloomfield Hills, MI 48301
248 645 5205

Robert Nyovich P29215
Joseph C. Bennett P39126
Attorneys for The Library Network
as Amicus Curiae
255 S. Old Woodward, 3rd Floor
Birmingham, MI 48009
248 988 5850

Joel H. Serlin P20224
Barry M. Rosenbaum P26487
Attorneys for Defendant/Appellee
2000 Town Center, Ste. 1500
Southfield, MI 48075
248 353 7620

Stephen O. Schultz P29084
Sarah J. Gabis P67722
Attorneys for Michigan Library Association
as Amicus Curiae
313 South Washington Square
Lansing, MI 48933
517 371 8100

130150

PLAINTIFF/APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

ORDER APPEALED FROM AND RELIEF SOUGHT

Plaintiff/Appellant seeks Application for Leave To Appeal the Court of Appeals November 8, 2005 decision. (Appendix 1)

In its opinion, the Court of Appeals affirmed the Circuit Court's decision that Plaintiff/Appellant had no constitutional right under Const 1963, Article 8, section 9, to a nonresident library card from Defendant/Appellee public library.

Plainitff/Appellant seeks application on the ground that neither decision properly considered the common understanding of the voters who approved the 1963 constitution or the circumstances surrounding the writing of the constitution and the purpose the writers sought to accomplish.

Plaintiff/Appellant requests that this Honorable Court peremptorily reverse the Court of Appeals decision, remand for further proceedings, if any be required by this Court, or in lieu thereof grant the application for leave to appeal.

INDEX OF AUTHORITIES

OTHER

JURISDICTIONAL STATEMENT

On April 7th 2006 this Court directed the parties to file supplemental briefs within 56 days and the Clerk to schedule oral argument on whether to grant Plaintiff/Appellant's application for leave to appeal or take other peremptory action.

The Order limits the briefs and oral argument to whether defendant's challenged library policy is a violation of Const 1963, art 8, section 9.

STANDARD OF REVIEW

Constitutional issues are reviewed *de novo* on appeal. *People v Nutt,* 469 Mich 565; 677 NW2 1 (2004)

STATEMENT OF QUESTION PRESENTED

DID THE COURT OF APPEALS CLEARLY ERR IN RULING THAT PLAINTIFF/APPELLANT HAD NO CONSTITUTIONAL RIGHT UNDER CONST 1963, ARTICLE 8, SECTION 9, TO BORROW BOOKS FROM DEFENDANT/APPELLEE PUBLIC LIBRARY?

Plaintiff-Appellant answers "Yes."

Defendant-Appellee answers "No."

The Court of Appeals answers "No."

STATEMENT OF FACTS

Plaintiff adopts by reference the facts described in his Application For Leave To Appeal the November 8, 2005 judgment of the Court of Appeals. (Appendix 2)

Plaintiff adopts by reference the affidavit of Tom Downs, a delegate to the 1961-1962 Constitutional Convention. Mr. Downs was one of three Vice-Presidents of the 144 member Constitutional Convention. The other Vice-Presidents were Edward Hutchinson and George Romney. (Appendix 3)

Plaintiff adopts by reference the affidavit of Milton E. Higgs, also a delegate to the 1961-62 Constitutional convention. Mr. Higgs served on the Style and Drafting Committee. That committee scrutinized all proposals to insure they were consistent, logical, well-stated expressions of the decisions of the full convention. (Appendix 4)

ARGUMENT I

THE NORTHWEST ORDINANCE OF 1787, THAT AUTHORIZED MICHIGAN TO BECOME A STATE, AND THE MICHIGAN CONSTITUTIONS OF 1835, 1850, 1908 AND 1963, CONFIRM THAT EDUCATION OF MICHIGAN RESIDENTS IS OF PARAMOUNT PUBLIC INTEREST.

There is a long history among the people of Michigan to encourage education and to provide the means for people to educate themselves. That history began 220 years ago, before Michigan became a state. The roots of this common understanding of the importance of education can be found in the Northwest Ordinance of 1787.

The Northwest Ordinance was adopted by the Confederation Congress, the legislative body of the United States that existed before the United States Constitution was adopted.

Members of the Confederation Congress understood that no government can endure unless its people are literate and educated, that schools and the means of education are essential to preserve and sustain a democratic society.

The Northwest Ordinance established guidelines and policies by which state governments could be formed from federal territories. Article 3 of the ordinance, incorporated in the 1908 and 1963 Michigan Constitutions,[1] emphasized the importance of education to the welfare and prosperity of the new states and to their residents:

> **Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and means of education shall forever**

---

[1] 1963 Const, art 8, section 1

be encouraged. [emphasis supplied]

The ordinance provided for public education two ways. For schools the ordinance divided the Michigan territory into townships of six square miles each, each township having 36 sections. Each township was required to sell one section and use the proceeds to help establish and finance public schools within the township.

For other than schools the ordinance directed that the "means of education" be made available to the people and that those means "shall forever be encouraged."

The Michigan constitutions of 1835,[2] 1850[3] and 1908[4] sought to make the "means of education" available to the people by directing the legislature to establish at least one public library in each township.[5] The 1850 and 1908 Constitutions added cities.

Unfortunately, from the Constitution of 1835 to the Constitutional Convention of 1961-1962, a period of 126 years, the plan to provide a "means of education" by building public libraries in each township and city had not been achieved.

The delegates to the 1961-1962 Constitutional Convention acknowledged the Constitutional plan to build more libraries had failed three times because it was not capable of being done.

---

[2] As soon as the circumstances of the state will permit, the legislature shall provide for the establishment of Libraries, one at least in each township…

[3] The legislature shall also provide for the establishment of at least one library in each township and city …

[4] The legislature shall provide by law for the establishment of at least one library in each township and city …

[5] A library located in the center of a 6 mile square township, for example, would be available to any resident of the township living within just three miles or so of the library.

capable of being done.

As a result the delegates made a dramatic shift in focus from buildings to people.

The delegates abandoned the plan to build more libraries and mandated instead that all public libraries "shall be available to all residents of the state."

Under the new plan the delegates guaranteed the people that the "means of education" , the public libraries and their books, shall be available to them.

It made no difference if the Michigan resident lived in the township or city where the library was located. The library, wherever located, was to be "available."

ARGUMENT II

WORDS IN THE CONSTITUTION ARE TO BE GIVEN THEIR PLAIN AND ORDINARY MEANING

The words of 1963 Const, art 8, section 9, that:

> **The legislature shall provide by law for the establishment and support of public libraries which shall be available to all residents of the state under regulations adopted by the governing bodies thereof.** [emphasis supplied]

are to be given their plain and ordinary meaning. *Halloran v Bahn,* 470 Mich 572; 683 NW2d 129 (2004).

Each relevant word in the Constitution should be given the:

> **meaning which it would naturally convey to the popular mind.** [emphasis supplied]

Committee for Constitutional Reform v Secretary of State, 425 Mich 336; 389 NW2d 430]1986] and *Regents of the Univ of Michigan,* 395 Mich 52; 235 NW2d 1 [1975]

Dictionaries uniformly define "available" as obtainable or accessible and ready for use or service. This dictionary definition is consistent with the definition of "available" as understood by the Constitutional Convention writers who selected the word.

The official record of the Constitutional Convention (Appendix 5) quotes delegate Higgs, on page 838, confirming that:

> [no] public library of this state would have any power whatsoever by regulation and neither would the legislature have any power to pass any statute which would contravene this language which we are placing in the Constitution. When you say 'which shall be available to all residents of the state,' **that is pretty clear.** I don't see how we could possibly deny

the availability of any books to any resident of the state of Michigan. [emphasis supplied]

There is no evidence in the official record of the Constitutional Convention that any delegate believed or proposed that a library regulation could change the "pretty clear" language of Article 8 that gives Michigan residents a constitutional right to borrow books.

The language in Article 8:

under regulations adopted by the governing bodies thereof

was proposed by delegate Dehnke. Defendant library argues that by "regulations" it has the right to control its books and unilaterally decide which Michigan residents it will make its books available to.

In this case defendant library has singled out all Michigan residents who live outside Bloomfield Township, declaring that none of those residents can borrow its books, unless the borrowing is permitted by contract.[6] Under the Court of Appeals decision now every public library in the state is able to exclude all Michigan residents outside the library's community or district. That decision "Balkanizes" library book borrowing.

When delegate Dehnke offered his amendment he explained public libraries shall be available to all residents of Michigan:

> 'under reasonable regulations' - which shall be available to all residents of the state, under reasonable regulations. That would at least give the library board the authority to lay down some regulations to set up the hours during which the library will

[6] The Court of Appeals decision also allows public libraries to demand contract payments, on new and renewed contracts, based on *ad valorem* tax revenue received by the library. [Issue VI]

be considered open *and all that sort of thing.* [emphasis supplied] [Appendix 5, page 836]

However, neither delegate Dehnke nor any other delegate, proposed that this amendment would change the plain and ordinary language of Article 8 that public libraries "shall be available to all residents of the state."

Further, based on delegate Dehnke's explanation as to the purpose of his amendment, a logical inference is that his amendment was not intended to make libraries and their books less available to Michigan residents.

To the contrary, the example he gave was a customary and conventional library regulation, the kind used to manage the day-to-day operations, such as checking books in and out, collecting fees and charges for lending books and for providing services, maintaining propriety and good behavior in speech and conduct, the hours "*and all that sort of thing.*"

Defendant library argues the words of Article 8 that give public libraries the authority to adopt regulations, gives every public library the absolute right to control who can borrow its books. However, Article 8 plainly does not give that authority and no delegate, including Dehnke, ever proposed a public library would have that authority.

There is ample evidence in the official record that the Dehnke amendment was designed to give public libraries the right to control and manage the constitutional right to borrow books. There is no evidence his amendment was intended to tread on that Constitutional right.

Further, no delegate took exception to the statement of Mr. Higgs that the language of Article 8 made it "pretty clear" that Michigan residents would have a

constitutional right to borrow books.

His statement was not challenged by any delegate before the Dehnke amendment was made, or afterwards.

Nothing should be read into Article 8 that is not within the intent of the delegates who wrote and approved it. *Halloran,* supra.

ARGUMENT III

A CONSTITUTIONAL RIGHT TO BORROW BOOKS IS CONSISTENT WITH THE COMMON UNDERSTANDING OF THE VOTERS ON APRIL 1ST 1963.

The "common understanding' of the voters of the words in Article 8 must be determined as of April 1st 1963, the date they ratified the Constitution.

This Court has developed several rules to aid in the interpretation of words used in the Constitution. The rules most quoted, and recently affirmed by this Court in *County of Wayne v Hathcock,* 471 Mich 445 (2004), are those of Justice Cooley:

> **A Constitution is made for the people and by the people... [T]he interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it...it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. [*Cooley's Const. Lim. 81,* quoted in *Buback V Romney,* 380 Mich 209; 156 NW2d 549 (1968)** [emphasis supplied]

This Court has said that:

a. the words are to be judged by the common understanding of the voters at the time of ratification;

b. the circumstances surrounding adoption of the words by their writers may be considered; and

c. constitutional validity of the words is preferred. [not applicable]

Hathcock, supra, *Traverse City School District v Attorney General,* 384 Mich 390; 185 NW2d 9 (1971) and *State Hwy Comm'n v Vanderkloot,* 392 Mich 159; 220 NW2d 416 (1974),

Evidence of the "common understanding", referred to by Justice Cooley, may be ascertained from the "times and circumstances' surrounding the date the Constitution was ratified. *Soap & Detergent Ass'n v Natural Resource Comm.*, 415 Mich 728, 745; 330 NW2d 346 (1982)

Among the "times and circumstances" is the fact that the "common understanding" of the proposed Constitution was enhanced prior to April 1st 1963 by the widespread distribution of that document across the state.

Publication of the proposed Constitution was mandated by 1961 PA 8 which read, in part, that:

> **The convention shall, before its adjournment, prepare and adopt an address to the people of the state, explaining the proposed changes in the present constitution, and the reason for such changes, and such other matters as to the convention shall seem advisable. Not less than 25,000 copies of this address, in pamphlet form, containing the full text of the revised constitution , shall be printed and distributed as the convention shall direct.** [emphasis supplied]

The affidavit of Milton E. Higgs, [Appendix 4] a delegate to the 1961-1962 Constitutional Convention, gives more detail about public discussions of the proposed Constitution before April 1st 1963

The Michigan Constitutions prior to 1963 authorized the establishment of public libraries in townships and cities which were to be supported by the state to insure they would be free and available to the people.

The legislature implemented these mandates in various ways, including statutes that encouraged expanding the availability of public libraries to Michigan residents through contractual arrangements.

The *City, Village and Township Libraries Act,* 1877 PA 164, states in its entitlement clause that Act 164 is intended to:

> **authorize, cities, incorporated villages, and townships to establish and maintain, or contract for the use of, free public libraries and reading rooms.** [emphasis supplied]

Section 13 of 1877 PA 164 refers to "a free public circulating library and reading room."

Existence of a "common understanding" on April 1st 1963 that books were loaned to Michigan residents who lived outside the library's community is evidenced by the statements of the 1961-1962 Constitutional Convention delegates.

In the course of research and deliberations, particularly on the part of the subcommittee on libraries headed by delegate Andrus, residents from across the state participated in the discussions. [Appendix 5, page 823]

Delegate Andrus spoke about libraries loaning their books to nonresidents. She said she had met with members of library associations and with librarians to discuss library services, including the borrowing books. She received information from an array of interested individuals, she said, including those with extensive library experience.

Based on her discussions and research she gave the delegates examples of how books borrowed from public libraries could be managed. [Appendix 5, page 835]

One example she gave was the Detroit Public Library, then the largest library in the state and in the most densely populated area of the state. The Detroit Public Library contracted with surrounding communities to make its books available. As an alternative to contracts she pointed out public libraries could charge individual, nonresident borrowers, a book borrowing fee. [Appendix 5, page 835]

Delegate Faxon spoke about the Detroit Public Library loaning its books throughout the state, including the upper part of the upper peninsula. [Appendix 5, page 828]

Delegate Bentley spoke about nonresident book borrowing. He said nonresidents can have books made available to them by complying with the public library's regulations:

> **as long as a person from any part of the state can come up to your library and conform with your local regulations and rules, he can have that library and its services and its books made available to him.** [emphasis supplied] [Appendix 5, page 836]

A logical inference from delegate Bentley's unchallenged explanation is that book borrowing was a constitutional right but the library governing board could adopt regulations to manage the borrowing. Obviously, unless an underlying right exists, including a Constitutional right, there would be nothing to regulate.

The official record of the Constitutional Convention, pp 822 - 837, [Appendix 5] shows that whenever the prevalent practice of book borrowing came up for discussion, no delegate proposed, either before the Dehnke amendment or after, that under Article 8 a public library would have an absolute right, as defendant library claims it has, to prohibit Michigan residents from borrowing its books.

As a matter of fact contracts among libraries and communities were encouraged by the delegates as a means to make library books more available, not less.

In addition to this understanding of libraries and books by the delegates to the Constitutional Convention, there also existed an understanding among the people as to public libraries and their books.

This Court could probably take judicial notice of the fact that for years, before 1963 and afterwards, Michigan residents have borrowed books from public libraries close home and from public libraries outstate while on business, attending school or on vacation.

On April 1st 1963, the "times and circumstances" show that by custom and usage the people generally understood that public libraries, often referred to as lending or circulating libraries, had long been free and "available to all residents of the state." Residents could enter and browse no matter where in the state they lived or whether they supported the public library they entered by paying local taxes or not.

The "times and circumstances" on April 1st 1963 show that by custom and usage the people generally understood that public libraries used library regulations to manage the use of their facilities by establishing what hours and days they would be open, what books to acquire, what equipment, furniture and fixtures to use, what decorum to require and other regulations designed to afford a safe, pleasant and comfortable environment.

The people generally understood on April 1st 1963 that public libraries established regulations for local and nonresident book borrowing, regulations to limit the number of books to be borrowed at one time, the length of time for borrowing and to limit circulation of special collections.

It is reasonable to conclude that on April 1st 1963 the proposed Constitution had been widely publicized and that "reasonable minds * * * commonly understood", even apart from the language of Article 8, that public libraries and their books were a means of education that ought to be encouraged. *Hathcock,* supra.

It is reasonable to conclude that on April 1st 1963 "reasonable minds * * *

commonly understood", even apart from the language of Article 8, that under prevailing customs and usage public libraries and their books were available to all residents of the state" subject to regulations adopted to manage the borrowing of books. *Hathcock,* supra.

ARGUMENT IV

A CONSTITUTIONAL RIGHT TO BORROW BOOKS IS CONSISTENT WITH THE FACTS AND CIRCUMSTANCES SURROUNDING THE WRITING OF THE 1963 CONSTITUTION IN 1961-1962

Discussions of Constitutional Convention delegates may be considered when interpreting the words they used and placed in the Constitution. *Committee for Constitutional Reform,* supra.

It is clear from the history of the Northwest Ordinance of 1787, and from the history of the four Michigan Constitutions, that the common understanding of the Constitutional Convention delegates was that public libraries were of paramount public importance for the education of the people and it would not be left to the discretion of the state legislature or local government to guarantee their existence.

To insure public libraries would be freely available to all the people, public libraries were given constitutional status and protection by the delegates at all four Constitutional Conventions.

At the 1961-1962 Constitutional Convention the discussions of Proposal 31, the genesis of Article 8, dealt mostly with the controversial issue of public libraries lending books and providing services to Michigan residents who paid no local taxes to support the library providing the books and services.[7]

---

[7] The Court of Appeals, on page 2 of its Opinion, in footnote 1, decided to include book borrowing as part of services, "[f]or the sake of simplicity. The Court was thereby able to characterize plaintiff/appellant's claim as a demand he was entitled to free services, the same

Near the end of the lengthy discussions, Delegate Higgs spoke about the right of Michigan residents to borrow books. As before noted delegate Higgs said the proposed language was "pretty clear" that no public library could deny the availability of its books to any Michigan resident nor could a library regulation or state statute take that right away.

Delegate Higgs clearly and specifically limited his statement to the constitutional right of nonresidents to borrow books. Mr. Higgs did not say or infer, that nonresidents had a constitutional right to free library **services,** which concerned delegate Leibrand, and rightly so.

As before noted, Delegate Bentley responded to Mr. Higgs by saying:

> What I am trying to explain, Mr. Higgs, -- and I am not a lawyer, as I have stated many times -- **but as long as a person from any part of the state can come to your library and conform to your local regulations and rules, he *can have* that library and its services *and its books made available to him.*** [emphasis supplied]

Delegate Dehnke then proposed to add to Article 8:

> **under reasonable regulations -- which shall be available to all residents, under reasonable regulations. That would at least give the library board the authority to lay down some regulations to set up the hours during which the library will be considered open a*nd all that sort of thing.*** [Emphasis supplied]

Neither delegate Dehnke, nor any delegate, proposed that Denke's amendment

---

services offered by defendant library to residents of Bloomfield Township. This case is only about a constitutional right to borrow books, not services. And plaintiff/appellant's offer to pay a book borrowing fee was rejected.

was intended to easily resolve the book borrowing issue by simply authorizing public libraries to adopt regulations to prohibit nonresidents from borrowing books. That would have been an obvious solution for any delegate to propose, obvious to even a most unobservant delegate, and it could have avoided the considerable time the delegates took to discuss the issue.

The fact that no delegate proposed public libraries could simply make their books unavailable, is highly persuasive evidence that the delegates commonly understood, and intended, that Article 8 gave all Michigan residents a constitutional right to borrow books provided they complied with library regulations adopted to manage the borrowing. This is supported by the affidavits of Tom Downs [Appendix 3] and Milton E. Higgs [Appendix 4]

The assertion that public libraries have absolute authority to decide what "available" means and to whom public libraries may decide to make their books available, ignores the fact that the delegates and the voters recognized the paramount importance of education to the residents of Michigan and that availability of the means of education is essential to the welfare of those Michigan residents, and to their state of Michigan.

ISSUE V

A CONSTITUTIONAL RIGHT TO BORROW BOOKS IS CONSISTENT WITH THE STATUTES THAT APPLIED TO PUBLIC LIBRARIES ON AND BEFORE APRIL 1ST 1963.

Prior to April 1st 1963 the legislature adopted various laws to support public libraries. The laws basically sought to improve and extend library services.

From 1835 to April 1st 1963, enabling legislation authorized city, county, township, village and school district governing boards to contract for library services, to establish libraries and to cooperate in the creation of library districts.[8]

A state board for libraries was created in 1937[9] and given the powers and duties formerly vested in a state librarian[10] and a board of library commissioners.[11]

Legislation also provided for regional libraries.[12]

None of these laws give public libraries the unilateral and absolute right to decide who can borrow their books.

None of these laws conflict with Article 8 of the 1963 Constitution.

As stated in *Macomb County Prosecutor v Murphy,* 464 Mich 149, 159-160; 627 NW2d 247 (2001), the rule of statutory interpretation is that laws are to be read so as to produce a harmonious and consistent result.

These laws are harmonious and consistent. They were intended to implement the

---

[8] 1952 PA 92; 1917 PA 138; 1955 PA 164; 1877 PA 164; 1917 PA 5; 1921 PA 26; 1925 PA 213, 1913 PA 261; and 1955 PA 269.
[9] 1937 PA 106
[10] 1895 PA 28
[11] 1931 PA 250
[12] 1931 PA 250

Constitutional mandates of 1835, 1850 and 1908 that the legislature create and support free public libraries. These laws enabled libraries to improve services, serve larger areas, and operate more efficiently using various funding sources the laws provided.

These laws are harmonious and consistent with a Michigan resident's Constitutional right under Article 8 to borrow books from any Michigan public library subject to a library's right to manage that borrowing with reasonable regulations.

None of these enabling laws, existing on or before April 1st 1963, authorize a public library to adopt a regulation to absolutely prohibit a resident from borrowing its books, especially where, as here, the denial is based on a failed effort to coerce a community into signing what amounts to a contract of adhesion.

ISSUE VI

IF NO CONSTITUTIONAL RIGHT TO BORROW BOOKS EXISTS PUBLIC LIBRARIES WILL BE ALLOWED TO INDIRECTLY TAX COMMUNITIES AND INDIVIDUALS UNDER THE GUISE OF NONRESIDENT BORROWING FEES, UNLIMITED AS TO AMOUNT, AND WITH NO OBLIGATION TO DISCLOSE ACTUAL COSTS AND USAGE

There is a mutual relationship between facts offered to show a constitutional right to borrow books and facts showing the consequences if such a right is denied. Evaluation of both sets of facts is helpful to understand what the delegates and voters sought to achieve and what they sought to avoid.

Defendant public library now has a Court of Appeals decision holding that Michigan residents who live in a community with no public library have no right to borrow books from any public library in Michigan.

As a result of that decision public libraries are empowered to limit the "means of education" by withholding books from Michigan residents even though Article 8 proclaims that the "means of education * * *shall forever be encouraged."

Public libraries have approximately 206 service contracts with local communities who pay the public libraries to make their books available to residents of those communities.

These contracts are limited by law to a period of three years. When they are negotiated, either initially or at renewal, the Court of Appeals decision will basically disarm the communities by giving public libraries a right to base their payment demands, for book borrowing, on what they receive in *ad valorem* taxes. Either pay that amount or

your residents will not be allowed to borrow our books. And if the public library networks with other libraries, it can cause those libraries to refuse to allow the residents to borrow their books. This is exactly what happened in this case.

The contract between defendant library and the City of Bloomfield Hills was not renewed because the library demanded a 100% increase in the contract price based on more parity with what the township residents paid in *ad valorem* taxes for defendant's operating, maintenance and other expenses. This is admitted by defendant library.

This effort by defendant library for *ad valorem* tax parity was by no means an isolated effort on the part of just defendant library.

Several months before the November 8th 2005 Court of Appeals decision, library lobbyists sought a state law that would give all Michigan public libraries the right to *require* taxpayers, whose communities had no public library, to match the *ad valorem* tax revenue received by the library from its taxpayers.

2005 PA 60, which became effective immediately on July 7th 2005, originally contained a provision, later deleted, that stated:

> **Any contract to provide library-related services to a municipality outside the district that is renewed or entered into after 1 year from the effective date of the amendatory act that added section 3A shall require the district to be compensated by the residents outside the district by an amount equivalent to the amount paid on average by residents per household of the district. In calculating the contract amount under this subdivision, the district library shall not include funds received through penal fines and other state aid.** [emphasis supplied] [Appendix 6]

In the legislative deliberations of the house and senate bills, the legislators decided, as a matter of public policy, to strike this provision.

As before stated, demanding contract payments based on *ad valorem* taxes is what led directly to the failure of defendant library to obtain renewal of its contract with the city. It also led directly to the immediate revocation by defendant library of all library cards it had issued to city residents. The obvious result was to limit the availability of library books, an essential "means of education."

Giving public libraries a statutory right to require communities to pay on an *ad valorem* basis to borrow books would lead to the same result throughout the state as happened in this case. If the payment demanded is not agreed to, no books can be borrowed.

The poorer communities in Michigan would suffer the most from such a law. Those communities, because of limited resources, would likely be unable to pay what the proposed law requires. As a result, the residents of those communities would be denied access to an important means of education, the ability to borrow books.

The substitute language in 2005 PA 60, agreed to by the legislators and the governor, allows public libraries to:

> **Enter into a contract to receive library-related service from or give library-related service to a library or a municipality within or without the district.** [emphasis supplied] [Appendix 6]

But what the public libraries were not allowed to do by the state legislature, as a matter of public policy, they are now fully able to do as a result of the Court of Appeals decision.

The record before the Court of Appeals contained a very specific statement by the President of its Board of Trustees:

When Township residents pay an average of $280 per housing unit for library services, it is not acceptable for City residents to pay an average per housing unit of $142 -- nearly half

All public libraries can now point to this position taken by defendant library and argue they have the legal right, by virtue of an opinion from a fully advised Court of Appeals, to demand that communities and individuals who seek to borrow books must pay an amount based on *ad valorem* tax revenue paid by the library's taxpayers.

Public libraries across the state are now poised to do this, now and at contract renewal time. They tried for this *ad valorem* tax parity through legislation. There can be no doubt about their intentions.

This will inevitably lead to greater atrophy of the rights granted to Michigan residents under Article 8 of their Constitution. Books will become even more unavailable.

According to defendant library's own statistics, for example, city residents had borrowed over 30,000 books before their nonresident library cards were summarily revoked.

Moreover, in green-lighting use of *ad valorem* taxes to pay for book borrowing, the Court of Appeals ignored what this Court said in *Bolt v The City of Lansing,* 459 Mich 152, 154, 158-159; 587 NW2d 264 (1968):

> Generally a "fee" is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A "tax", on the other hand, is designed to raise revenue.

There is an admission in this case by defendant library, a nonprofit organization, that it has the right to use its books to coerce revenue from taxpayers living in another community that has no library.

The Court of Appeals decision raises a serious collateral question as to whether payments based on *ad valorem* taxes are unconstitutional. They could well be viewed as illegal *ad valorem* taxes imposed on taxpayers in other communities without their consent and likely in violation of the Headley amendment, as well, that applies to public bodies, such as defendant library.

The Court of Appeals decision also allows public libraries to ignore MCL 397.561a, the law that limits nonresident borrowing fees to the actual costs incurred by public libraries when books its books are borrowed.

CONCLUSION

As Justice Cooley warned, the interpretation that should be given to the Constitution is that which the reasonable minds, the great mass of people themselves, would give it. He said, in part, that:

> the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark and abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. *Hathcock,* supra.

There are no facts in this case to support a belief that "the reasonable minds, the great mass of the people themselves" looked for "dark and abstruse meanings" of Article 8. *Hathcock,* supra.

Specifically, there are no facts in this case to support a reasonable belief that on April 1st 1963 the voters commonly understood the language of Article 8 to mean:

a. that if they lived in a community with no public library they would have no right to borrow books from any public library in the state;

b. that if they lived in a community with no public library but had a library card to borrow books, the public library that issued the card could summarily revoke it whether it had been issued directly or pursuant to a contract not renewed;

c. that if they lived in a community with no public library their community would have no right to contract with a public library to make book borrowing available to them;

d. that if they lived in a community with no public library a public library willing to contract for book borrowing would make the books available for borrowing only if they, or their community, agreed to pay a borrowing fee based on the library's *ad valorem* tax revenue, not on the actual costs of providing the books;

e. that if they lived in a community with no public library a public library willing to contract for book borrowing could base the fee on what the market will bear."[13] to provide services.[14] or on any other basis selected;

f. that if they lived in a community with no public library, a public library, even though a nonprofit government organization, would have no obligation to disclose whether the borrowing fee demanded from individual residents or their their communities is justified by actual costs incurred and, if pursuant to a contract, justified by the actual number of books borrowed; and

g. that if they lived in a community with no public library, a public library willing to contract for book borrowing can seek to coerce their community to agree to the contract by causing other public libraries to refuse to lend their books also.[15]

There are no facts in this case that show on April 1st 1963 the voters commonly understood these "dark and abstruse" meanings of Article 8.

However, by assuming the voters looked for and understood these "dark and abstruse" meanings of Article 8, it greatly facilitated a decision that the voters had no reason to believe on April 1st 1963 that Article 8 gave them a constitutional right to borrow books.

Parenthetically, there are no facts in this case, nor could there be, that on April 1, 1963 the voters had any "common understanding" of laws effective after that date, including 1964 PA 59, 1977 PA 89, or 1989 PA 24, all cited by defendant library to support its argument that Michigan residents have no constitutional right to borrow its books if they live outside Bloomfield Township, unless otherwise entitled to by contract.

---

[13] Page 16, Appellee's Brief in Opposition to Appellant's Application for Leave to Appeal.
[14] Both Appellee and the Court of Appeals [11/8/05 Opinion, page 2, footnote 1] mistakenly characterize Appellant's claim as a demand for free services. This case is about book borrowing.
[15] The Court of Appeals found that 90 public libraries refused to make their books available for borrowing by city residents as a result of defendant library's failure to obtain renewal of its contract with the city.

RELIEF

For the foregoing reasons, Plaintiff /Appellant respectfully requests this Honorable Court to grant his Application for Leave To Appeal so this Court may fully address the important constitutional issues he raised.

Alternatively, plaintiff requests that this Honorable Court reverse the decision of the Court of Appeals, provide a policy that clarifies the rights and obligations of public libraries, and remand this case to the trial court for an order consistent with its Opinion, including an order directing the trial court to restrain defendant library from participating with the 90 other public libraries in the denial of book borrowing by plaintiff and to award costs and expenses, including reasonable counsel fees.

Respectfully submitted,

Robert E. Toohey P 21500
Attorney for Plaintiff/Appellant
1790 Hammond Court
Bloomfield Hills, MI 48304
248 540 3330

Dated: June 2nd 2006